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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DARREN ANDREW PETRICKA,

No. C 08-05040 RS (PR)

Petitioner,

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

v.

JAMES A YATES, Warden,

Respondent.

INTRODUCTION

This is a federal habeas corpus action filed pursuant to 28 U.S.C. § 2254 by a *pro se* state prisoner. For the reasons stated herein, the petition is DENIED.

BACKGROUND

In 2005, a Napa County Superior Court jury convicted petitioner of two counts of genital penetration by a foreign object, one count of felony false imprisonment, and three counts of sexual battery by restraint. Consequent to the verdicts, petitioner was sentenced to 15 years-to-life in state prison. Petitioner filed the instant petition after being denied relief on direct state review.

No. C 08-05040 RS (PR)
ORDER DENYING PETITION

1 Evidence presented at trial demonstrates that in 2003, petitioner sexually assaulted his
 2 friend's girlfriend, Amber. In November 2003, petitioner knocked on the door of the house
 3 Amber shared with her boyfriend Perez, a friend of the petitioner. After Amber, Perez, and
 4 petitioner talked for a few minutes, Perez and petitioner left the house. Amber then went to
 5 the bathroom. While there, petitioner returned to the house, and stood behind Amber and
 6 talked to her. Petitioner, who was a large man of about 300 pounds, sat on the bed while
 7 Amber, who had told petitioner that she was leaving to meet a friend, looked for her keys,
 8 purse, and cigarettes. As she stood in front of him, petitioner grabbed Amber, started
 9 rubbing her shoulders, and made lewd and suggestive comments. When Amber then pulled
 10 away, petitioner grabbed her by the hips. Despite her demand for him to stop, petitioner
 11 pulled her closer, and held her there with his legs crossed over hers, facing away from him.
 12 As his legs and arms were around her, he took off her shirt and undershirt, unhooked her bra,
 13 licked her spine, and grabbed and groped her breasts. Amber pulled away and she started
 14 looking for her keys. Petitioner said that he was "just trying to feel [her] out to see if [she]
 15 was a slut for his friend." He also said not to worry because he would not touch her again.
 16 Terrified, Amber went to the bathroom as she tried to figure out how to get petitioner out of
 17 the house, but he followed her. Amber saw a box on the bed, put it on petitioner's head and
 18 pushed him backwards about four feet. When petitioner removed the box and looked at her,
 19 Amber "nervously laughed, thinking that he wouldn't take it so seriously, so he wouldn't
 20 hurt me."

21 Amber went back to the front room while petitioner went to the porch. Amber
 22 telephoned her friend, Patrick Gibson, and told him to come over immediately. Petitioner
 23 came back into the house and sat on the bed. As Amber started looking for her keys,
 24 petitioner asked her to call him "Daddy," pulled her hair, put his arms around her, pulled her
 25 to the bed, and tried to put his tongue in her mouth, saying that he would take care of her and
 26 Perez. Petitioner made various additional suggestive remarks prompting Amber to jump up
 27 and say she needed a cigarette "right now." Petitioner responded that he would take her to
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1 the store. She said, "no," but he insisted; his tone of voice was aggressive, which scared her.
 2 Petitioner insisted and so they went outside, got into his van, and drove to a gasoline
 3 "convenience" store.

4 When they returned from the store, Amber tried to make it to the door first, but failed.
 5 She did not try to run away because she had no car keys. "We were in the middle of nowhere.
 6 I thought he would catch me and hurt me. I would make things worse, I thought. I was
 7 paralyzed at this time, too." Once inside, Amber smoked a cigarette while petitioner sat
 8 against the bed. She told him several times that he needed to leave. Petitioner again grabbed
 9 Amber from behind, held her with his arms and legs, and felt her breasts underneath her shirt,
 10 while Amber said that she loved Perez. Petitioner tackled her, and pushed her onto the floor.
 11 Amber fell face first, and petitioner got on top of her. She said, "Stop. Get off me."
 12 Petitioner pinned her wrists down, moved one hand into her pants and put either one or two
 13 fingers inside her vagina. Petitioner said she felt good, tried to put his tongue in her mouth,
 14 and asked her to kiss and "fuck" him. Amber was scared, cried, attempted to get away, and
 15 asked petitioner to get off her. Petitioner took his fingers out of Amber's vagina, put them in
 16 his mouth, and said she "tasted good." He then put his fingers back into her vagina for about
 17 20 more minutes. After about 20 minutes, Amber and petitioner heard Pat Gibson arrive.
 18 Petitioner got off Amber, and said, "Fix yourself up." (Ans., Ex. 2 at 3-5.)

19 As grounds for federal habeas relief, petitioner claims that (1) the trial court violated
 20 due process and abused its discretion in permitting inadmissible propensity evidence;
 21 (2) there was insufficient evidence to support the convictions for digital penetration, and one
 22 count of sexual battery, which denied petitioner his right to due process; (3) trial counsel
 23 rendered ineffective assistance by failing to move for a new trial based on insufficiency of
 24 evidence; (4) the imposition of consecutive sentences violated his Sixth Amendment rights
 25 because the jury, not the court, should have been assigned the task of determining whether
 26 the two incidents of digital penetration took place on separate occasions; and (5) there was
 27 insufficient evidence to show that the digital penetrations occurred on separate occasions.
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STANDARD OF REVIEW

2 This Court may entertain a petition for writ of habeas corpus “in behalf of a person in
3 custody pursuant to the judgment of a State court only on the ground that he is in custody in
4 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).
5 The petition may not be granted with respect to any claim that was adjudicated on the merits
6 in state court unless the state court’s adjudication of the claim: “(1) resulted in a decision
7 that was contrary to, or involved an unreasonable application of, clearly established Federal
8 law, as determined by the Supreme Court of the United States; or (2) resulted in a decision
9 that was based on an unreasonable determination of the facts in light of the evidence
10 presented in the State court proceeding.” 28 U.S.C. § 2254(d).

11 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state
12 court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of
13 law or if the state court decides a case differently than [the] Court has on a set of materially
14 indistinguishable facts.” *Williams (Terry) v. Taylor*, 529 U.S. 362, 412–13 (2000). “Under
15 the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state
16 court identifies the correct governing legal principle from [the] Court’s decision but
17 unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. “[A]
18 federal habeas court may not issue the writ simply because that court concludes in its
19 independent judgment that the relevant state-court decision applied clearly established
20 federal law erroneously or incorrectly. Rather, that application must also be unreasonable.”
21 *Id.* at 411. A federal habeas court making the “unreasonable application” inquiry should ask
22 whether the state court’s application of clearly established federal law was “objectively
23 unreasonable.” *Id.* at 409.

DISCUSSION

I. Admission of Propensity Evidence

26 Petitioner claims that the trial court violated his right to due process when it admitted
27 testimony from Heather S. regarding a prior sexual offense petitioner committed against her.

1 (Pet. at 7.) Heather was allowed to testify as to the facts of the offense, but was not allowed
 2 to mention that petitioner had been convicted of committing sexual battery against her. The
 3 state appellate court rejected petitioner's claim, concluding that the evidence was properly
 4 admitted under state rules of evidence. (Ans., Ex. 2 at 11.)

5 Petitioner's claim fails. The United States Supreme Court has left open the question
 6 of whether admission of propensity evidence violates due process. *Estelle v. McGuire*, 502
 7 U.S. 62, 75 n. 5 (1991). Because the Supreme Court has reserved this issue as an "open
 8 question," the Ninth Circuit has held that a petitioner's due process right concerning the
 9 admission of propensity evidence is not clearly established for purposes of review under
 10 AEDPA. Consequently, petitioner's claim is DENIED because he has failed to show that
 11 there was "no reasonable basis for the state court to deny relief," *Harrington v. Richter*, 131
 12 S. Ct. 770, 784 (2011), that is, he has not shown that the state court's decision was contrary
 13 to, or involved an unreasonable application of, clearly established Supreme Court precedent.

14 **II. Sufficiency of the Evidence**

15 Petitioner claims that there was insufficient evidence to support the convictions for
 16 (A) the two counts of digital penetration, and (B) sexual battery. (Pet. at 7.) More
 17 specifically, petitioner's claim is that Amber's testimony regarding the events is so
 18 implausible that his convictions cannot be upheld. The state appellate court rejected this
 19 claim on grounds that petitioner was trying to reweigh the evidence and challenge credibility,
 20 rather than to show that the evidence was insufficient.

21 Petitioner is not, in truth, challenging whether the evidence is sufficient, that is,
 22 whether the evidence meets the elements of the offenses. Rather, as the state appellate court
 23 found, his claim is that Amber and other witnesses are not credible. This claim must be
 24 denied. By convicting petitioner, the jury accepted Amber's testimony as credible, and
 25 rejected as not credible the defense's arguments and evidence. A jury's credibility
 26 determinations are entitled to near-total deference. *Bruce v. Terhune*, 376 F.3d 950, 957 (9th
 27 Cir. 2004). If confronted by a record that supports conflicting inferences, a federal habeas
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1 court “must presume — even if it does not affirmatively appear on the record — that the trier
 2 of fact resolved any such conflicts in favor of the prosecution, and must defer to that
 3 resolution.” *Jackson v. Virginia*, 443 U.S. 307, 326 (1979). This Court must accord the
 4 jury’s credibility finding the highest deference, and presume that it resolved any conflicts in
 5 the evidence in favor of the prosecution. Consequently, petitioner’s claim is DENIED
 6 because he has failed to show that there was “no reasonable basis for the state court to deny
 7 relief,” *Richter*, 131 S. Ct. at 784, that is, he has not shown that the state court’s decision was
 8 contrary to, or involved an unreasonable application of, clearly established Supreme Court
 9 precedent.

10 **III. Assistance of Defense Counsel**

11 Petitioner claims that defense counsel rendered ineffective assistance by failing to
 12 move for a new trial on grounds that the evidence was insufficient to support the convictions.
 13 (Pet. at 7.) The state appellate court did not rule on this claim in its written opinion.

14 Claims of ineffective assistance of counsel are examined under *Strickland v.*
 15 *Washington*, 466 U.S. 668 (1984). In order to prevail on a claim of ineffectiveness of
 16 counsel, the petitioner must establish two factors. First, he must establish that counsel’s
 17 performance was deficient, i.e., that it fell below an “objective standard of reasonableness”
 18 under prevailing professional norms, *id.* at 687–68, “not whether it deviated from best
 19 practices or most common custom,” *Richter*, 131 S. Ct. at 788 (citing *Strickland*, 466 U.S. at
 20 650). “A court considering a claim of ineffective assistance must apply a ‘strong
 21 presumption’ that counsel’s representation was within the ‘wide range’ of reasonable
 22 professional assistance.” *Richter*, 131 S. Ct. at 787 (quoting *Strickland*, 466 U.S. at 689).
 23 Second, he must establish that he was prejudiced by counsel’s deficient performance, i.e.,
 24 that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result
 25 of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. A reasonable
 26 probability is a probability sufficient to undermine confidence in the outcome. *Ibid.* Where
 27 the defendant is challenging his conviction, the appropriate question is “whether there is a
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1 reasonable probability that, absent the errors, the factfinder would have had a reasonable
 2 doubt respecting guilt.” *Id.* at 695.

3 Petitioner’s claim fails because he has not shown that a new trial motion would have
 4 been successful. Under the facts of the instant matter, the only possible bases for a new trial
 5 motion under Cal. Pen. Code § 1181 subsections (6) and (7): “[w]hen the verdict or finding
 6 is contrary to law or evidence.” Petitioner has not shown that a new trial motion would have
 7 been successful on such grounds. The jury found the prosecution’s evidence to be credible,
 8 and rejected the defense’s challenges to that evidence. Petitioner has shown nothing, other
 9 than his disbelief in Amber’s credibility, that is contrary to fact or law in the jury’s decision.
 10 Petitioner has not shown that any motion based on such grounds would have been successful.
 11 Because it is both reasonable and not prejudicial for an attorney to forego a meritless
 12 objection, *see Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005), defense counsel cannot
 13 have rendered ineffective assistance simply by not making a motion for a new trial on the
 14 grounds suggested by petitioner. Consequently, petitioner’s claim is DENIED because he
 15 has failed to show that there was “no reasonable basis for the state court to deny relief,”
 16 *Richter*, 131 S. Ct. at 784, that is, he has not shown that the state court’s decision was
 17 contrary to, or involved an unreasonable application of, clearly established Supreme Court
 18 precedent.

19 **IV. & V. Imposition of Consecutive Sentences**

20 Petitioner claims that (A) imposition of consecutive sentences violated his Sixth
 21 Amendment rights because the sentencing decision was based on factors determined by the
 22 judge, not by the jury, and (B) that the two digital penetrations did not constitute “separate
 23 occasions” for purposes of the mandatory consecutive sentencing procedure under state law.
 24 (Pet. at 7.) The state appellate court rejected both claims on state law grounds. (Ans., Ex. 2
 25 at 26, 29–30.)

26 Both (A) and (B) are foreclosed by case law because they are based on alleged
 27 violations of state law. “The decision whether to impose sentences concurrently or
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1 consecutively is a matter of state criminal procedure and is not within the purview of federal
 2 habeas corpus.” *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994). More
 3 specifically, Sixth Amendment jury trial protections do not apply to a trial court’s decision to
 4 impose concurrent or consecutive sentences, *see Oregon v. Ice*, 129 S. Ct. 711, 714–15
 5 (2009), and whether the two penetrations qualify as “separate occasions” under California
 6 law is a question of state law. As such, these claims are not subject to review by a federal
 7 habeas court. *See Swarthout v. Cooke*, 131 S. Ct. 859, 862 (2011). Consequently,
 8 petitioner’s claim is DENIED because he has failed to show that there was “no reasonable
 9 basis for the state court to deny relief,” *Richter*, 131 S. Ct. at 784, that is, he has not shown
 10 that the state court’s decision was contrary to, or involved an unreasonable application of,
 11 clearly established Supreme Court precedent.

12 CONCLUSION

13 The state court’s adjudication of petitioner’s claim did not result in a decision that was
 14 contrary to, or involved an unreasonable application of, clearly established federal law, nor
 15 did it result in a decision that was based on an unreasonable determination of the facts in
 16 light of the evidence presented in the state court proceeding. Accordingly, the petition is
 17 DENIED.

18 A certificate of appealability will not issue. Reasonable jurists would not “find the
 19 district court’s assessment of the constitutional claims debatable or wrong.” *Slack v.*
 20 *McDaniel*, 529 U.S. 473, 484 (2000). Petitioner may seek a certificate of appealability from
 21 the Court of Appeals.

22 Petitioner alleges in a letter to the Court (Docket No. 26) that he has found
 23 exculpatory evidence. Nothing in this filing supports such an allegation. In the letter,
 24 petitioner alleges that the prosecution failed to disclose to petitioner that a charge of failing to
 25 register as a sex offender in another jurisdiction had been reduced to a charge of false arrest
 26 and eventually dismissed. Petitioner has not shown how this information is exculpatory as to
 27 the convictions at issue here. He also has not shown how this information would have been
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1 relevant to his defense, especially considering that the trial court disallowed any testimony
2 regarding what criminal convictions petitioner suffered pursuant to the earlier allegations.
3 Nor has petitioner shown why the prosecution had a duty to disclose such publicly and
4 personally available information. Insofar as this filing constitutes a motion, it is DENIED.
5 The Clerk shall enter judgment in favor of respondent, and close the file.

6 **IT IS SO ORDERED.**

7 DATED: July 13, 2011


RICHARD SEEBORG
United States District Judge

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